

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

ROBERT ROTH AND JUDITH ROTH

DETERMINATION

for Redetermination of a Deficiency or for :
Refund of New York State Personal Income Tax :
under Article 22 of the Tax Law and New York :
City Personal Income Tax under Chapter 46, :
Title T of the Administrative Code of the City :
of New York for the Years 1980, 1981 and 1982.

Petitioners, Robert Roth, 930 Park Avenue, New York, New York 10021, and Judith Roth, 370 East 76th Street, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1980, 1981 and 1982 (File No. 802212).

A hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 25, 1987 at 9:15 A.M. and was continued to conclusion on July 23, 1987 at 9:15 A.M., with all briefs to be submitted by January 31, 1988. Petitioners appeared by Hancock & Estabrook, Esqs. (E. Parker Brown, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether petitioner Robert Roth was a domiciliary of New York State and New York City for the years 1980, 1981 and 1982, or maintained a permanent place of abode within New York and spent more than 183 days in the State and was thus taxable as a resident individual.

II. Whether the negligence penalty imposed under Tax Law § 685(b) should be cancelled.

FINDINGS OF FACT

1. On July 7, 1981, petitioners, Robert Roth and Judith Roth, filed a joint New York State Income Tax Nonresident Return, together with a City of New York Nonresident Earnings Tax Return,

for the year 1980. On said returns, wage income of \$27,820.00 earned by Robert Roth from Exchange Media was allocated to New York State and City sources on the basis of a percentage determined by placing the number of days worked in the State and City (146) over the total number of working days (242).

2. On October 9, 1982 and September 12, 1983, respectively, petitioner Robert Roth filed a New York State Nonresident Income Tax Return, together with a City of New York Nonresident Earnings Tax Return, for each of the years 1981 and 1982, under the filing status "head of household". On said returns, Mr. Roth's wage income of \$169,355.00 for 1981 and \$209,128.00 for 1982 received from Exchange Media and RMR Advertising, Inc., was allocated to New York State and City sources on the same basis as indicated above as follows:

	<u>1981</u>	<u>1982</u>
Number of days worked in the State and City		<u>141133</u>
Total number of working days	241	237

3. On March 7, 1985, the Audit Division issued statements of audit changes to petitioners¹ for the years 1980, 1981 and 1982 wherein total wage income earned by Robert Roth from all sources was held taxable to New York State and City on the basis that petitioners were statutory residents. On April 12, 1985, the Audit Division issued a Notice of Deficiency to petitioners asserting additional New York State personal income tax for said years of \$102,735.00, plus penalty of \$5,137.00 and interest of \$32,988.87, for a total amount due of \$140,860.87. A separate Notice of Deficiency was issued for New York City personal income taxes of \$47,809.00, plus penalty of \$2,390.00 and interest of \$14,647.90, for a total of \$64,846.90.

4. In December 1986, petitioner Robert Roth paid \$238,403.00 to the Department of Taxation and Finance representing the additional tax, penalty and interest accrued thereon.

5. Petitioners, Robert Roth and Judith Roth², were married in 1961 and had three children. Through the 1960's and early 1970's they lived in several different locations in and near New York City and also in California. In 1974 they purchased a house

¹The Audit Division conceded that petitioner Judith Roth is not liable for any tax for the years 1981 and 1982.

²Hereinafter Robert Roth will be termed "petitioner". Judith Roth will be referred to by name.

in Brookville, Long Island.

6. In October 1976, petitioner formed RMR Advertising, Inc. ("RMR") and he was named president and chief executive officer. RMR is an advertising business involved in the buying and selling of television and radio advertising time. In addition, it produced commercials for television and radio. During 1976 petitioner frequently traveled to Florida on business to start the new operation. During this period, petitioner and his wife were having marital difficulties. At Thanksgiving Judith and the children traveled to Florida to be with petitioner. Judith decided to stay in Florida with the children over the winter months. The Brookville house remained unoccupied. In February 1977 the water pipes froze causing extensive damage to the house. The house was under repair for about six months and then sold later in the year.

7. In May 1977, petitioner and his family returned to New York from Florida and subleased an apartment at 920 Park Avenue for the summer. In the fall of 1977, petitioner and his family moved temporarily to the Hotel Seville³ until they could take possession of a cooperative apartment they were in the process of leasing on the 13th floor at 930 Park Avenue. On January 17, 1978, petitioner and Judith purchased the 13th floor apartment with the intent to divide the 13th floor into two apartments, selling one and retaining one. Petitioner and Judith assumed the lease from the former tenant and became shareholders of the cooperative. Petitioner and Judith continued to experience marital difficulties in the later months of 1977 and separated in January 1978. Following the separation, Judith and the children moved into the 13th floor of 930 Park Avenue, which was yet undivided. They continued with the plans to retain, divide and sell part of the 13th floor of 930 Park Avenue. In July 1978, petitioner and Judith entered into a contract for the sale of the south portion of the 13th floor of 930 Park Avenue. Judith and the children moved to an apartment located at 370 East 76th Street, New York in August 1978. The 13th floor was divided into the two apartments and the sale of the south portion was closed in October 1978. At the same time, petitioner and Judith entered into a new proprietary lease with the owner of 930 Park Avenue regarding the north portion of the 13th floor.

8. After the separation from Judith, petitioner subleased an apartment at 2 Lincoln Square, 60 West 66th Street, New York. Petitioner also purchased the furnishings in the apartment and moved his personal effects into the apartment. Petitioner entered into a lease for the apartment when his sublease expired. The lease expired in 1982, but petitioner extended the lease and

³Petitioner was part owner of the Hotel Seville at this time.

currently retains the apartment.

9. In December 1979, petitioner purchased a home in Torrington, Connecticut. It was a three-story home with a living room, dining room, kitchen, family room, four bedrooms and three bathrooms. Petitioner moved his personal effects to the Torrington home from the 66th Street apartment and then purchased new furnishings for the home. In addition, Judith loaned petitioner some family photographs and paintings. Petitioner did leave behind a change of clothes and a few toiletries at the apartment. Petitioner obtained a telephone listing in his name for the Torrington residence. Petitioner was dissatisfied with his relationship with the children after separation. As a result, he purchased the Torrington home to have a place to spend time with his children. Petitioner did not consider the 66th Street apartment a suitable place for this purpose. The children were ages 18, 17 and 5 years.

10. After petitioner purchased the Torrington home, the 66th Street apartment became a "corporate apartment"; that is, it was primarily used for business meetings of RMR and was available to clients of RMR for overnight stays. During the period 1980 to 1982, petitioner used the apartment on the average of one night per week, usually on those occasions when extended business matters or meetings kept him late into the evening. Petitioner did not change the name on the lease from his own to RMR for fear that the building management would not permit it.

11. The north portion of the 13th floor at 930 Park Avenue was uninhabitable from October 1978 to December 1982. The renovations were delayed because of difficulties with various contractors performing the work. Petitioner began to make occasional use of 930 Park Avenue immediately after the renovations were completed. During 1983 petitioner divided his time between 930 Park Avenue and Torrington. Thereafter, 930 Park Avenue admittedly became his permanent residence.

12. During the years in issue, petitioner's business required him to travel. RMR had major clients in Trevoze, Pennsylvania; Philadelphia, Pennsylvania; and Atlantic City, New Jersey. Petitioner also traveled frequently to the offices of RMR in Miami, Florida. Petitioner was still affiliated with businesses in California to which he made periodic business trips. While in Florida, petitioner stayed with his father at "Seacoast Towers", 5151 Collins Avenue, Miami Beach, and later in 1983 at 2000 Quayside Towers, North Miami Beach. These addresses were used by petitioner's accountant on Federal and New York State income tax returns filed for 1981 and 1982. The Torrington, Connecticut address was used for petitioner's 1980 tax returns.

13. When petitioner was working in the New York area, he returned to Torrington except for an occasional overnight stay at the 66th Street apartment. He commuted in his personal automobile. Torrington, Connecticut was approximately 70 plus miles from New York City and the driving time ranged from one hour and thirty minutes to two hours and thirty minutes depending on the time of day.

14. Petitioner submitted a listing of his whereabouts on a daily basis for the years 1980 to 1982. The listings were prepared from diaries maintained by petitioner and his recollection of the notations therein. The year-end summaries of days were as follows:

	<u>1980</u>	<u>1981</u>	<u>1982</u>
New York	177	159	149
Connecticut	157	142	156
Out of Town	32	63	47

The diaries were not kept for tax purposes and the notes for the most part were illegible and meaningless to anyone but petitioner.

15. Petitioner possessed driver's licenses for New York State and Florida. He did not obtain a Connecticut driver's license or maintain a personal bank account in Connecticut. Petitioner was not registered to vote in New York or Connecticut, and did not execute a will in either state or become a member of any church or civic organization in either state.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

B. That section 605(a) of the Tax Law defines a resident individual as one:

"(1) who is domiciled in this state, unless (A) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the

taxable year in this state, or...

(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

C. That 20 NYCRR 102.2(d) provides, in pertinent part, as follows:

"Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

Subdivision (e)(1) of said regulation defines permanent place of abode as:

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode".

D. That in order to create a change of domicile, both the intention to make a new location a fixed and permanent home and actual residence at that location must be present (Matter of Minsky v. Tully, 78 AD2d 955). The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bodfish v. Gallman, 50 AD2d 457). Moreover, the evidence to establish the required intention to effect a change of domicile must be clear and convincing (cf. Matter of Bodfish v. Gallman, supra). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (see____, e.g., Matter of Zinn v. Tully, 54 NY 713 revq 77 AD2d 725).

After petitioner Robert Roth separated from his wife Judith, he resided at the 66th Street apartment from February 1978 to December 1979 at which time he moved to Connecticut. This move was predicated solely on his desire to provide a better environment for spending time with his children and to improve the relationship between them. Petitioner did not abandon any of his business, social or personal interests in New York State. He continued to fulfill his responsibility as president of RMR and retained the lease on the 66th Street apartment. More importantly, however, petitioner maintained ownership of 930 Park Avenue, continued with the renovations of the apartment while living in Connecticut and immediately made use of the apartment upon completion of such renovations. Within a short time thereafter, it became his primary residence.

An individual's original or selected domicile continues until there is a clear manifestation of an intent to acquire a new one (Matter of Clute v. Chu, 106 AD2d 841). Petitioner's actions, considered as a whole, did not establish by clear and convincing evidence that he intended to make Torrington, Connecticut a fixed and permanent home. Accordingly, petitioners Robert Roth and Judith Roth were domiciliaries of New York State in 1980 and Robert Roth was domiciled in the State for the years 1981 and 1982.

E. That, for each of the years at issue, the Audit Division

imposed penalty pursuant to Tax Law § 685(b). This penalty is imposed if "any part of a deficiency is due to negligence or intentional disregard of [Article 22] or rules or regulations hereunder". Petitioners filed nonresident returns believing that they had effected a change of domicile. While it has herein been determined that such change of domicile did not occur, no negligence or intentional disregard of the Tax Law or regulations by petitioners has been shown and, as such, penalties imposed pursuant to section 685(b) of the Tax Law are cancelled.

F. That in view of Conclusion of Law "D", the issue of whether Robert Roth maintained a permanent place of abode within New York State and spent more than 183 days in the State is rendered moot.

G. That the petitions of Robert Roth and Judith Roth are granted to the extent indicated in Conclusion of Law "E". The Audit Division is hereby directed to modify the notices of deficiency issued April 12, 1985, and the petition is in all other respects denied.

DATED: Albany, New York
April 28, 1988

_____/s/_____

JUDGE

ADMINISTRATIVE LAW